



FEDERAL ELECTION COMMISSION

WASHINGTON, D C 20463

MAR 02 2005

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Benjamin L. Ginsberg, Esq.
Patton Boggs LLP
2550 M Street, NW
Washington, DC 20037-1350

RE: MURs 5511 and 5525 (Swift Boat Vets)

Dear Mr. Ginsberg:

On August 17, 2004, and September 7, 2004, the Federal Election Commission notified your client, Swift Boat Vets and POWs for Truth, of complaints alleging violations of certain sections of the Federal Election Campaign Act of 1971, as amended ("the Act"). Copies of the complaints were forwarded to your clients at that time.

Upon further review of the allegations contained in the complaints and information provided by you, the Commission, on February 17, 2005, found that there is reason to believe that Swift Boat Vets violated 2 U.S.C. §§ 433, 434, 441a, 441a(f), and 441b(a), provisions of the Act. The Factual and Legal Analysis, which formed a basis for the Commission's finding, is attached for your information. Please note that respondents have an obligation to preserve all documents, records and materials relating to the Commission's investigation.

You may submit any factual or legal materials that you believe are relevant to the Commission's consideration of this matter. Statements should be submitted under oath.

Any additional materials or statements you wish to submit should accompany the response to the subpoena and order. In the absence of additional information, the Commission may find probable cause to believe that a violation has occurred.

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Requests for extensions of time will not be routinely granted. Requests must be made in writing at least five days prior to the due date of the response and specific good cause must be demonstrated. In addition, the Office of the General Counsel ordinarily will not give extensions beyond 20 days.

This matter will remain confidential in accordance with 2 U.S.C. §§ 437g(a)(4)(B) and 437g(a)(12)(A), unless you notify the Commission in writing that you wish the investigation to be made public.

If you have any questions, please contact Peter Blumberg, the attorney assigned to this matter, at (202) 694-1650.

Sincerely,



Michael E. Toner
Vice Chairman

Enclosures

Factual and Legal Analysis

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FEDERAL ELECTION COMMISSION
FACTUAL AND LEGAL ANALYSIS

Respondent: Swift Boat Vets and POWs for Truth

MURs: 5511 and 5525

I. INTRODUCTION

MUR 5511 was generated by a complaint filed by Democracy 21, the Campaign Legal Center, and the Center for Responsive Politics on August 10, 2004. *See* 2 U.S.C. § 437g(a)(1). MUR 5525 was generated by a complaint filed by Kerry-Edwards 2004 on August 30, 2004. *See id.* Both complaints allege that Swift Boat Vets and POWs for Truth ("Swift Boat Vets"), an entity organized under Section 527 of the Internal Revenue Code, spent millions of dollars, raised outside the limitations and prohibitions of the Federal Election Campaign Act of 1971, as amended, (the "Act") to influence the recent presidential election. The complaints also allege that Swift Boat Vets failed to properly report its activities to the Commission and that it coordinated its activities with President Bush's principal campaign committee, Bush-Cheney '04. In response, Swift Boat Vets denies that it is a political committee under the Act, denies that any of its communications contained express advocacy, and denies coordinating any expenditures with any outside organization or individual.

II. FACTUAL AND LEGAL ANALYSIS

A. Factual Background

Swift Boat Vets, a Section 527 organization established on April 23, 2004, has not registered as a political committee with the Commission, nor is it associated with any registered political committee. Swift Boat Vets funded its activities with nonfederal funds raised outside the limitations and prohibitions of the Act. In its IRS disclosure reports, Swift Boat Vets

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reported receipts of \$18,715,390 and disbursements of \$22,565,360 during the 2004 calendar year.¹ In its electioneering communications reports filed with the Commission, Swift Boat Vets reported \$20,941,845 in donations for communications that cost \$18,813,850. Several individuals have given in excess of \$1 million to Swift Boat Vets, which also accepts corporate funds in a separate account.

Swift Boat Vets' activities and public statements have been exclusively geared toward criticizing John Kerry during his presidential campaign.

- On May 4, 2004, at the press conference launching Swift Boat Vets, eighteen Vietnam veterans signed an open letter to John Kerry "challenging his fitness to serve as commander-in-chief of America's armed forces."²
- On June 1, 2004, Swift Boat Vets sent a cease and desist letter to John Kerry for President, Inc. on behalf of 11 officers shown in a photograph, pointing out that using their images in a campaign advertisement "wrongfully and incorrectly suggests their present endorsement of his candidacy."³
- On September 12, 2004, Swift Boat Vets co-sponsored the "Kerry Lied Rally" gathering of Vietnam veterans in Washington, DC with the Vietnam Veterans for Truth.⁴
- On October 28, 2004, Swift Boat Vets announced that the documentary "Stolen Honor," which criticizes John Kerry's Vietnam service, would now be available free on Swift Boat Vets' website.⁵
- Swift Boat Vets' website shows a picture of Kerry that states, "of the 19 veterans pictured with Kerry, only THREE actually support him for president. 12 now state that Kerry is 'UNFIT to be Commander-in-Chief.'"⁶ (emphasis in original).
- Swift Boat Vets Steering Committee member Alvin Horne was asked on a news program whether Swift Boat Vets's television advertisements were produced and made to influence the presidential election. He responded, "Yes, of course."⁷

¹The discrepancy between receipts and disbursements may be due to IRS disclosure thresholds. The Internal Revenue Code provides for the disclosure of donations to Section 527 organizations by donors who give an aggregate of \$200 or more to the organization during a calendar year and does not require the disclosure of total donations. See 26 U.S.C. § 527(j)(3)(B).

² See <http://horse.he.net/~swiftpow/index.php?topic=SwiftVetQuotes>

³ See <http://www.swiftvets.com/index.php?topic=SwiftPhoto>

⁴ See <http://horse.he.net/~swiftpow/index.php?topic=Releases>

⁵ See <http://horse.he.net/~swiftpow/index.php?topic=Releases>

⁶ See <http://www.swiftvets.com/index.php?topic=SwiftPhoto>

- John O'Neill, Co-Chairman of Swift Boat Vets, stated, "We think that he knew he was lying when he made the charges, and we think that they're unsupportable. We intend to bring the truth about that to the American people. We believe, based on our experience with him, that he is totally unfit to be the Commander-in-Chief."⁸
- Rear Admiral Roy Hoffmann, Chairman of Swift Boat Vets stated, "I do not believe John Kerry is fit to be Commander-in-Chief of the armed forces of the United States. This is not a political issue. It is a matter of his judgment, truthfulness, reliability, loyalty and trust -- all absolute tenets of command."⁹
- After the election, Roy Hoffman reportedly stated, "We feel that our primary mission has been accomplished,"¹⁰ and "I don't think there is any doubt that we succeeded."¹¹

Swift Boat Vets has also produced nine television advertisements, all of which identify and attack John Kerry. Some of these advertisements also include footage of Kerry's running mate, John Edwards, such as the following advertisement:

"Why?" (Released on October 13, 2004)

JOHN EDWARDS [from speech used in Kerry's "Three Minutes" ad]: If you have any questions about what John Kerry's made of...	<i>Footage of a speech by John Edwards. Text: Questions?</i>
VAN ODELL: Why do so many of us have serious questions?	<i>Footage of an interview with Van Odell. Text: Van Odell; Gunners Mate, Coastal Div. 11.</i>
LOUIS LETSON: How did you get your purple heart when your commanding officer didn't approve it?	<i>Footage of an interview with Louis Letson. Text: Dr. Louis Letson, Medical Officer</i>
STEVE GARDNER: Why have you repeatedly claimed you were illegally sent into Cambodia...	<i>Footage of an interview with Steve Gardner. Text: Steve Gardner, PCF-44, John Kerry's Boat.</i>
BOB ELDER: ... when it's been proven that you were not?	<i>Footage of an interview with Bob Elder. Text: Bob Elder; OIC, Coastal Div. 11.</i>
JIM WERNER: How could you accuse us of being war criminals...	<i>Footage of an interview with Jim Werner. Text: Jim Werner; Former POW.</i>

⁷ See <http://transcripts.cnn.com/TRANSCRIPTS/0408/06/pzn.00.html>

⁸ See <http://horse.he.net/~swiftpow/index.php?topic=SwiftVetQuotes>

⁹ See <http://horse.he.net/~swiftpow/index.php?topic=SwiftVetQuotes>

¹⁰ http://thehill.com/campaign/112404_swift.aspx

¹¹ http://www.timesdispatch.com/servlet/Satellite?pagename=RTD%2FMGArticle%2FRTD_BasicArticle&c=MGArticle&cid=1031779014071&path=!news!politics&s=1045855935264

KEN CORDIER ... and secretly meet with the enemy in Paris...	<i>Footage of an interview with Ken Cordier. Text: Ken Cordier; Former POW.</i>
MIKE SOLHAUG: ... and promote the enemy's position back home...	<i>Footage of an interview with Mike Solhaug. Text: Mike Solhaug; OIC, PCF 57.</i>
PAUL GALANTI: ... when I was a POW, and Americans were being killed in combat.	<i>Footage of an interview with Paul Galanti. Text: Paul Galanti; Former POW.</i>
BUD DAY: How can you expect our sons and daughters to follow you, when you condemned their fathers and grandfathers?	<i>Footage of an interview with Bud Day. Text: Bud Day; Former POW, Medal of Honor Recipient.</i>
JOE PONDER: Why is this relevant?	<i>Footage of an interview with Joe Ponder. Text: Joe Ponder; Gunners Mate, Coastal Div. 11.</i>
TOM HANTON: Because character and honesty matter. Especially in time of war.	<i>Footage of an interview with Tom Hanton. Text: Tom Hanton; Former POW.</i>
ROY HOFFMAN: John Kerry cannot be trusted.	<i>Footage of an interview with Roy Hoffman. Text: Rear Admiral Roy Hoffman; Commander Task Force 115.</i>
ANNOUNCER [v/o]: Swift Vets and POWs for Truth are responsible for the content of this advertisement.	<i>Text: Paid For By Swift Boat Veterans For Truth And Not Authorized By Any Candidate Or Candidate's Committee. www.SwiftVets.com. Swift Boat Veterans For Truth Is Responsible For The Content Of This Advertisement.)</i>

The complaint in MUR 5525 also notes various reported connections between persons associated with Swift Boat Vets and persons associated with the Republican Party and/or President Bush's reelection campaign. Most prominent is Kenneth Cordier, a retired Air Force colonel who served as a member of the Bush-Cheney '04 Veterans National Steering Committee. In June 2004, Cordier gave a speech to the Veterans of Foreign Wars on behalf of Bush-Cheney '04. Soon after giving that speech, Cordier was recruited by Swift Boat Vets to become a member of that organization. In August, Cordier appeared in one of Swift Boat Vets' television advertisements. After Cordier informed Bush-Cheney '04 of his involvement with Swift Boat Vets, Bush-Cheney '04 relieved him of his position as a member of the Veterans Steering

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Committee.¹² Cordier has stated to the media that the crossover between his time with Bush-Cheney '04 and with Swift Boat Vets was inadvertent and that his involvement with Swift Boat Vets was independent of his activities with Bush-Cheney '04.

The complaint in MUR 5525 also alleges that Swift Boat Vets and Bush-Cheney '04 sponsored a joint rally in Alachua, Florida, though both organizations have denied playing any role in the event. The complaint also states that many donors to Swift Boat Vets have also donated to President Bush's campaign or to the Republican Party. For example, Bob Perry, who gave \$6,000,000 to Swift Boat Vets, has also given millions of dollars to Republican candidates and committees. Perry is also a longtime political associate and friend of Karl Rove, Bush's chief political strategist.

B. Political Committee Status

Because Swift Boat Vets' public statements and television advertisements focus on influencing the 2004 presidential election, the organization may be a political committee subject to the contribution limitations, source prohibitions, and reporting requirements of the Act. *See* 2 U.S.C. §§ 431(4)(A), 433, 434, 441a, and 441b. The Act defines a "political committee" as any committee, club, association, or other group of persons that receives "contributions" or makes "expenditures" for the purpose of influencing a federal election which aggregate in excess of \$1,000 during a calendar year. 2 U.S.C. § 431(4)(A). The term "contribution" is defined to include "any gift, subscription, loan, advance, or deposit of money or anything of value made by any person for the purpose of influencing any election for Federal office." 2 U.S.C.

§ 431(8)(A)(i). *See, e.g., FEC v. Survival Educ. Fund, Inc.*, 65 F.3d 285, 295 (2d Cir. 1995)

(where a statement in a solicitation "leaves no doubt that the funds contributed would be used to

¹² Bush-Cheney '04 and Swift Boat Vets also shared the same legal counsel, Benjamin Ginsberg, who likewise resigned from Bush-Cheney '04 after his dual role was publicized.

advocate [a candidate's election or] defeat at the polls, not simply to criticize his policies during the election year," proceeds from that solicitation are contributions).

As a Section 527 organization, Swift Boat Vets is by law "a party, committee, association, fund, or other organization (whether or not incorporated) organized and operated primarily for the purpose of directly or indirectly accepting contributions or making expenditures, or both, for an exempt function." 26 U.S.C. § 527(e)(1). The "exempt function" of 527 organizations is the "function of influencing or attempting to influence the selection, nomination, election or appointment of any individual to any Federal, State, or local public office or office in a political organization," or the election or selection of presidential or vice presidential electors. 26 U.S.C. § 527(e)(2). As a factual matter, therefore, an organization that avails itself of 527 status has effectively declared that its primary purpose is influencing elections of one kind or another.

Swift Boat Vets claims in its response to the complaints that it is not a political committee because its purpose is simply "to add to the public debate essential information about John Kerry's post-Vietnam charges of war crimes and his own Vietnam record." Yet as detailed in the prior section, Swift Boat Vets' public statements, television advertisements, and website all go well beyond simply providing information and instead attempt to influence the presidential election. Prominent examples of these efforts to influence the election include television advertisements that reference and rebut Kerry's campaign ads, a website that explicitly notes which members "support [Kerry] for president," and public statements that Kerry is "totally unfit to be the Commander-in-Chief."

Overall, publicly available information amply demonstrates that Swift Boat Vets raised and spent millions of dollars to attack and oppose a single candidate for federal office—John

Kerry—by explicitly challenging his fitness to serve as President of the United States.

Accordingly, it is appropriate for the Commission to investigate whether Swift Boat Vets has, among those millions spent and received, made \$1,000 in “expenditures,” or received \$1,000 in “contributions,” and thus is a political committee. If Swift Boat Vets is a political committee, then it is subject to the contribution limitations, source prohibitions, and reporting requirements of the Act.¹³ See 2 U.S.C. §§ 431(4)(A), 433, 434, 441a, and 441b. Therefore, there is reason to believe that Swift Boat Vets violated 2 U.S.C. §§ 433, 434, 441a(f), and 441b(a) by failing to register as a political committee with the Commission; by failing to report its contributions and expenditures; by knowingly accepting contributions in excess of \$5,000; and by knowingly accepting corporate and/or union contributions.

C. Coordinated Communications with Bush-Cheney '04

Publicly available information also supports investigating whether Swift Boat Vets coordinated expenditures for its television advertisements or other activities with Bush-Cheney '04. See 11 C.F.R. § 109.21. A communication is coordinated with a candidate, an authorized committee, a political party committee, or agent thereof if it meets a three-part test: (1) payment by a third party; (2) satisfaction of one of four “content” standards;¹⁴ and (3) satisfaction of one of six “conduct” standards. See 11 C.F.R. § 109.21.

¹³ To address overbreadth concerns, the Supreme Court has held that only organizations whose major purpose is campaign activity can potentially qualify as political committees under the Act. See, e.g., *Buckley v. Valeo*, 424 U.S. 1, 79 (1976); *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238, 262 (1986). In its responses to the various complaints, Swift Boat Vets does not appear to dispute the complainants’ contention that its major purpose is to engage in federal campaign activity.

¹⁴ In *Shays v. FEC*, 337 F. Supp. 2d 28 (D.D.C. 2004), *appeal filed*, No. 04-5352 (D.C. Cir. Sept. 28, 2004), the District Court invalidated the content standard of the coordinated communications regulation and remanded it to the Commission for further action consistent with the Court’s opinion. In a subsequent ruling, the Court explained that the “deficient rules technically remain ‘on the books,’” and did not enjoin enforcement of this (or any other) regulation pending promulgation of a new regulation. *Shays v. FEC*, 340 F. Supp. 2d 39, 41 (D.D.C. 2004).

In this matter, the first prong of the coordinated communication test is satisfied because Swift Boat Vets is a “person other than [the] candidate, authorized committee, political party committee, or agent of any of the foregoing” that paid for television advertisements. 11 C.F.R. § 109.21(a)(1). The second prong of this test, the content standard, is satisfied because Swift Boat Vets’ television advertisements qualify as “public communications” under 11 C.F.R. § 109.21(c)(4). Swift Boat Vets does not dispute that these two prongs are satisfied. Rather, a finding that Swift Boat Vets engaged in coordinated communications depends, at this stage, on an analysis of its activities under the “conduct” prong of the coordinated communication test.

The conduct standard is met if the communication is made at the “request or suggestion” or with the “material involvement” of the candidate, an authorized committee, a political party committee, or agent thereof; or after “substantial discussion” with the relevant candidate or committee. 11 C.F.R. § 109.21(d). Regarding “material involvement,” the conduct prong is satisfied if a candidate or his authorized committee is materially involved in decisions regarding the communication, such as its content, intended audience, means or mode, specific media outlet used, timing or frequency, or size or prominence. *See* 11 C.F.R. § 109.21(d)(2). Similarly, the conduct prong is satisfied if a communication is produced after one or more “substantial discussions” about the communication between the person paying for the communication and an authorized committee. 11 C.F.R. § 109.21(d)(3). A “substantial discussion” is one in which material information about the candidate’s campaign plans, projects, activities or needs is conveyed to a person paying for the communication. *Id.*

Here, there is reason to investigate whether Swift Boat Vets coordinated its communications with Bush-Cheney ‘04 through Kenneth Cordier. Cordier served as a member of the Bush-Cheney ‘04 Veteran’s National Steering Committee at the same time as he appeared

in a television advertisement for Swift Boat Vets. Swift Boat Vets and Bush-Cheney '04 shared the goal of defeating John Kerry, and both organizations concurrently utilized Cordier to focus on veterans' issues in achieving that goal. Cordier's dual positions thus warrant examining whether he possessed and conveyed information concerning Bush-Cheney '04's "plans, projects, activities, or needs" or whether he was materially involved in decisions regarding the content or other aspects of Swift Boat Vets' television advertisements. *See* 11 C.F.R. § 109.21(d).

Although Swift Boat Vets denies the coordination allegations, it did not provide any statements or other affirmative evidence to support its arguments. For example, no specific information was provided as to the exact nature of Cordier's role in Swift Boat Vets' television advertisements or as to what information Cordier may have conveyed to Swift Boat Vets about Bush-Cheney '04. Because Swift Boat Vets has offered only conclusory statements about the nature of Cordier's positions, an inquiry is appropriate to determine if its broad and unsworn assertions can be substantiated and confirmed.

The complaint in MUR 5525 also contends that coordination can be evidenced by a campaign rally in Florida focusing on veterans that was allegedly sponsored by both Bush-Cheney '04 and Swift Boat Vets. The supplement to this complaint attached a flier publicizing this rally, which states that the event was sponsored by the Alachua Bush-Cheney Committee and Swift Boat Vets, among other groups. In response, Swift Boat Vets has explicitly disavowed its involvement in this event, contending that it did not hold or even authorize the rally. Bush-Cheney '04 has made similar public statements denying its involvement in the rally. Nonetheless, as with Cordier's service, an inquiry would be appropriate to verify that the campaign rally was organized by local activists independent of both Bush-Cheney '04 and Swift Boat Vets.

Overall, given the lack of specific information provided by Swift Boat Vets to counter the allegations, there is sufficient evidence to investigate whether Swift Boat Vets coordinated its communications or other expenditures with Bush-Cheney '04. The regulations specify that a payment for a coordinated communication is made for the purpose of influencing a federal election, constitutes an in-kind contribution to the candidate or committee with whom or which it is coordinated, and must be reported as an expenditure made by that candidate or committee. *See* 11 C.F.R. § 109.21(b)(1). Therefore, there is reason to believe that Swift Boat Vets violated 2 U.S.C. §§ 441a and 434 by making and failing to report excessive contributions, in the form of coordinated expenditures, to Bush-Cheney '04.

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